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UNCLAS SECTION 01 OF 05 BRASILIA 002150

SIPDIS

STATE FOR WHA/BSC, EB/TPP/MTA/IPC SWILSON, AND CA/VO
STATE PASS TO USTR FOR SCRONIN, LYANG AND BPECK
USDOC FOR
4322/ITA/MAC/WH/OLAC/WBASTIAN/JANDERSEN/DMCDO UGALL/DRISCOLL
USDOC FOR 3134/USFCS/OIO/EOLSON/DDEVITO
TREASURY FOR OASIA/SEGAL
NCS FOR DEMPSEY

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SUBJECT: PIRACY CPI CONCLUDES; NEW LEGISLATION PUT FORWARD

REFS: A) BRASILIA 2017 B) BRASILIA 1668

¶1. The highly respected Chamber of Deputies' Parliamentary Investigative Commission (CPI) on Piracy (ref B) formally concluded its year-long proceedings on August 11, 2004. In the three-hour-long closing ceremony, members of the commission and from the private sector uniformly stressed the need for a greater recognition within society of the importance of intellectual-property protection, and for active follow-up to the CPI's report. In at times emotional statements, the Deputies called for a cultural mind-shift, emphasizing that beyond the self-evident economic damage caused by piracy -- the loss of tax revenues and of jobs, the stifling of creativity and innovation -- basic governance in Brazil is threatened by the growth of the informal economy and of organized crime associated with piracy. Deputy Semeghini noted with some consternation that the USG is threatening to remove trade benefits from Brazil under the Generalized System of Preferences for inadequate IPR protection at the very time Brazil is itself mobilizing to address the issue (ref A).

¶2. In a formal ceremony on August 12, Deputy Medeiros led the CPI in presenting the Commission's final report to President Lula, who was flanked by Minister of Political Coordination, Aldo Rebelo, and Minister of Justice Marcio Bastos. President Lula did not speak, but Minister Bastos used the occasion to announce the formation of a public-private sector National Council for the Defense of Intellectual Property and for the Fight Against Piracy. As of this report, the decree establishing this council is not final; report to follow septel.

¶3. As a result of their work, Deputies of the CPI introduced on July 16, 2004 five pieces of legislation, three aimed at stiffening penalties for copyright infringement. Although the CPI deputies are intent on making this legislation a priority, it is unlikely the Brazilian Congress will pass these bills before spring of 2005. Below is Embassy's unofficial translation of one of the bills (the other four will be transmitted septel.) The "Justification" which follows the text of the bill provides a summary of the changes being introduced into domestic IPR legislation and their rationale.

¶4. "Bill PL 3964/2004 of the Piracy CPI

Modifies Articles 184 and 186 and adds Article 184-A to the Penal Code; alters regulations in the Criminal Procedure Code, with regard to crimes against non-material property.

The National Congress decrees:

Article 1 - This Law modifies and adds regulations to the Penal Code and Criminal Procedure Code to aid the fight against piracy.

Article 2 - Article 184 of Decree-law no. 2.848 of December 7, 1940, is amended with the new text in paragraphs 1 and 2 and the following paragraph 5 below being added:

"Article 184.

Paragraph 1: If the violation consists in the total or partial reproduction, by any means or process, fixed in any support, tangible or intangible, with the intent to profit directly or indirectly, from an intellectual work, computer software, phonogram, videotape, interpretation or execution, without the express authorization of the author, interpreter, executor, producer or of those who represent them:

Penalty - detention for 2 (two) years and 2 (two) months to 4 (four) years, and a fine.

Paragraph 2: The same penalty applies to whoever acquires, distributes, sells, puts on sale, rents, introduces into the country, hides, loans, exchanges or warehouses, with

the intent to profit directly or indirectly, original or copy of an intellectual work or express audiovisual by any means or fixed in any support, tangible or intangible, produced or reproduced in violation of the author's rights, without the express authorization of the owners of the rights or those who represent them.

Paragraph 3:

Paragraph 4:

Paragraph 5: Independent of the conviction of the perpetrator of the crime, whenever the counterfeiting of an intellectual work or industrial product is certified through an expert's finding, the judge can, ex officio, by means of a petition from the author whose rights were violated or by the Public Ministry, determine the destruction of the criminal production or reproduction, or send it to aid institutions or social programs that house minors or elderly people, as long as the substance is not detrimental to health or physical well-being." (new wording)

Article 3 - Decree-law no. 2.848 of December 7, 1940, will now be amended to include the following Article 184-A:

"Article 184-A. To publish, offer publicity services or transmit by any means, conventional or electronic, ads or information destined towards the purchase, sale, rental, import, export of original or copy of an intellectual work in violation of the author's or interpreter's rights, phonogram, videotape or any industrialized product registered under the terms of Law no. 9.279/96 without the express authorization of the owners of the rights or their representatives.

Penalty - detention for 2 (two) years and 2 (two) months to 4 (four) years, and a fine.

Paragraph 1 - The same penalty applies to whoever divulges information about the means, form of manufacture or acquisition of raw materials destined to the counterfeiting of products listed in the caput of this article, even if the author of the counterfeiting is not identified and independent of his conviction.

Paragraph 2 - In case of recidivism, the penalty will be increased by two-thirds."

Article 4 - Clause II of Art. 186 of Decree-law no. 2.848, of December 7, 1940, will be amended to include the following text:

"Article 186

II unconditional public penal action, for crimes covered in paragraphs of Article 184 and in the circumstances described in art. 184-A; (new wording)"

Article 5 - Article nos. 527, 530-B to 530-F and 530-H of Decree-law no. 3.689, of October 3, 1941, will be amended to include the following text:

"Art. 527. The search or seizure investigation, in the case of private penal action, will be performed by two experts named by the judge, who will verify the existence of grounds for the seizure, and whether this happens or not, the expert opinion will be presented within 3 (three) days after closure of the search process. (new wording)

Art. 530-B. In cases of infractions determined in the paragraphs of Articles 184, 184-A of the Penal Code and paragraphs 1 and 2 of Article 12 of Law no. 9.609/98, the police authority will proceed with the seizure of goods illegally produced or reproduced, support and material that contribute to counterfeiting, as long as they are principally destined to illegal practices or commercialization of their product.

Art. 530-C. At the time of seizure a document will be drafted, signed by 2 (two) or more witnesses, containing the description of all seized goods and information about the location of seizure, and, if possible, of the person who had them in his possession, in a way that will permit his identification and individualization, which will become an integral part of the police inquiry or trial. (new wording)

Art. 530-D. Subsequent to the seizure, an investigation will be done, by official experts, or lacking these, by a technically apt person, on samples of the seized goods in sufficient quantity to prove the crime, and a report will be prepared that will become part of the police inquiry or trial. (new wording)

Art. 530-E. The titleholders of author's rights and those

connected to them or, alternatively, the association of titleholders of author's rights and those connected to them, will be the true holders of all seized goods, placing them at the disposition of the judge during the trial.

Art. 530-F. Except for the necessity of preserving the corpus delicti (material evidence), the judge can determine, before passing sentence or during the inquisitorial phase, at the request of the injured party or the Public Ministry, the latter always being heard, the destruction of the seized production or reproduction when its legitimacy is not contested or when the penal action cannot be initiated due to lack of determination of the author of the crime.

Sole paragraph: Independent of the conviction of the author of the crime, the judge can determine the use of the counterfeit merchandise by aid entities or social programs for children, adolescents or the aged, as long as it is not detrimental to the health or physical safety of the recipients. (new wording)

Art. 530-H. The associations of copyright titleholders and those connected to them can, in their own name, function as assistants to the prosecution for the crimes determined in Art. 184 and 184-A of the Penal Code and art. 12 of Law no. 9.609 of February 19, 1998, when those crimes are to the detriment of any of its associates.

Article 6 - This law goes into effect on the date of its publication.

JUSTIFICATION

The bill that the Piracy CPI hereby presents has as its objective to modify the penal law in order to fight piracy, so prevalent in our society.

During all these months of work, besides all those directly affected by piracy, the Commission heard various representatives of the Public Ministry. They were unanimous in stating that despite the good intentions of the legislature with regard to Laws no. 9.099 and 10.259/00 concerning Special Civil and Criminal State and Federal Judgeships respectively, the regulations in Art. 89 of Law 9.099, described in Law no. 10.259/00, create the impression that piracy is a crime of lesser importance.

These regulations concede the benefit of procedural sursis to the author of a crime whose minimum penalty is equal to or less than one year.

Since as a result of the work done by the CPI the connection between piracy and organized crime became overwhelmingly proven, the stiffening of some penalties is necessary, not simply for the sake of saying that the law is rigorous, but to avoid that people involved in these criminal organizations operate on the margins of the law, freely transiting Brazilian territory, with so-called organized crime becoming more and more deeply rooted, and reinforcing a "sense of impunity".

The minimum and maximum fines set forth in Article 184 were also removed, inasmuch as the system adopted in the general part of the Penal Code allows the imposition of even larger penalties. Besides, it is known that monetary penalties in nominal values lose their impact over time, which is not desirable.

Also, a provision was added to the Penal Code to establish as a crime the advertising (by various means), manufacture or acquisition of raw materials for the counterfeiting of pirated products, even in cases in which the identity of the counterfeiter is unknown and independent of the counterfeiter's conviction, because it is unacceptable to exclude this type of crime and culpability from the law when the perpetrator is unknown, since his existence is proven.

Regarding the changes to the Criminal Procedure Code, we strove to make them compatible with changes made by this PL to the Penal Code, and, in the case of art. 530-B, determined that the investigations of search and seizure should encompass the totality of counterfeit merchandise and the equipment for its non-authorized production or reproduction, besides enabling the seizure of documents that can identify those who acquire the counterfeit material or the members that make up a specific gang.

The modification of Article 530-C is to ensure that the act of seizure be as detailed as possible, since it becomes an integral part of the evidence.

Currently, art. 530-D determines that an expert opinion on seized merchandise be done on all goods seized. Seizures can consist of hundreds of thousands of units of the same

product. It is not reasonable to demand an expert opinion on all of them. A sampling, in this case, is a measure of reasonability, by which we propose "expert opinion on samples of the goods seized in a quantity sufficient to prove crime."

Evoking the same measure of reasonability, we are proposing a change in Article 530-E, so that associations of titleholders of author's rights can be named valid holders, since most of the time it is impossible for an individual to maintain sufficient storage to accommodate the absurd amount of merchandise being seized in Brazil.

Article 530-E is compatible with paragraph 5, inserted by us in Art. 184 of the Penal Code.

Finally, the new version of Article 530-H allows that in new cases covered in Article 184-A of the Penal Code, contained in this bill, and in cases of Article 12 of Law no. 9.609 of February 19, 1998, that regulates the protection of software intellectual property, the associations of titleholders of author's rights and those connected to them can, in their own name, function as assistants to the prosecution.

Through the above and the belief that the adoption of the measures hereby proposed will aid in the fight against piracy, the Piracy CPI counts on the support of the illustrious Deputies for the conversion of this bill into law.

Deputy Medeiros, President
Deputy Josias Quintal, Reporter"

(End Unofficial Embassy Translation.)

Danilovich